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IN THE COURT OF APPEALS OF INDIANA

KENRAY ASSOCIATION, INC. a/k/a KENRAY, INC.; CHARLES A. McGEE; and KENNETH J. McGEE,	)	
Appellants-Defendants,	)	
vs.	)	No. 22A05-0702-CV-90
HOOSIER INSURANCE COMPANY,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Steve M. Fleece, Special Judge
Cause No. 22D01-0406-PL-0209

October 3, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Kenray Association, Inc. a/k/a Kenray, Inc., Charles A. McGee, and Kenneth J. McGee, (collectively "Kenray") appeals the Floyd Superior Court's grant of summary judgment in favor of Hoosier Insurance Company ("Hoosier") in Hoosier's action seeking declaratory judgment to determine its duties and obligations under its policies insuring Kenray. Upon appeal, Kenray presents four issues, which we consolidate and restate as whether the trial court properly determined that claims brought by Kenray's customers are not covered by the Hoosier policies.

We affirm.

Facts and Procedural History

The relevant facts are essentially undisputed. Kenray is a computer software and consulting business located in Greenville, Indiana. Kenray sells and installs computer software for clients, including software known as "Kenray 32" or "K-32," which was developed by Kenray. Among Kenray's clients were Illinois-based C.A. Fortune and Company ("Fortune"), and the Texas-based companies Atkinson Candy Company ("Atkinson") and Judson Atkinson Candies, Inc. ("Judson Atkinson").

Fortune, Atkinson, and Judson Atkinson all purchased Kenray 32 software from Kenray, but found that the software did not function properly. Fortune subsequently filed suit against Kenray in Illinois, alleging breach of express and implied warranties. Atkinson and Judson Atkinson filed suit in the United States District Court for the Southern District of Indiana, alleging breach of contract, a violation of the Texas

Deceptive Trade Practices Act, and seeking civil recovery under Indiana statutes for the crimes of criminal mischief, computer tampering, criminal trespass, and deception.

At the times relevant to this appeal, Kenray had purchased a commercial marketplace policy and a commercial umbrella policy from Hoosier. When Kenray informed Hoosier of the suits filed against it, Hoosier refused to defend Kenray and instead filed an action for declaratory judgment seeking to determine its duties and obligations under the policies insuring Kenray.

On September 20, 2004, Hoosier filed a motion for summary judgment. On October 18, 2004, Kenray filed a response to Hoosier's motion along with a cross-motion for summary judgment.[1] On February 16, 2005, the Atkinson companies intervened in the declaratory judgment action and filed a brief in opposition to Hoosier's motion for summary judgment. The trial court held a summary judgment hearing on June 24, 2005 and entered summary judgment in favor of Hoosier on January 23, 2007. Kenray now appeals.

Standard of Review

Summary judgment is appropriate only where the designated evidence reveals no genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. Garneau v. Bush, 838 N.E.2d 1134, 1140 (Ind. Ct. App. 2005), trans. denied. The moving party bears the burden of showing that there are no genuine issues of material fact; if the moving party meets its burden, then the burden shifts to the non-

[1] On December 7, 2004, Kenray entered into an agreed judgment with both Atkinson and Judson Atkinson, settling those companies' complaints against Kenray for $163,12.04 and $329,241.57 respectively.

moving party to set forth facts showing the existence of a genuine issue for trial. Id. In determining whether the trial court properly granted summary judgment, we give careful scrutiny to the pleadings and designated materials, construing them in the light most favorable to the non-movant, while also clothing the trial court's decision with a presumption of validity. Davis v. LeCuyer, 849 N.E.2d 750, 752 (Ind. Ct. App. 2006), trans. denied.

The interpretation of an insurance policy is generally a question of law and is appropriate for summary judgment. Hartford Cas. Ins. Co. v. Evansville Vanderburgh Pub. Library, 860 N.E.2d 636, 640 (Ind. Ct. App. 2007). An insurance contract is subject to the same rules of interpretation as are other contracts. Id. If the language in the insurance policy is clear and unambiguous, then we should give it its plain and ordinary meaning, but if the language is ambiguous, we should strictly construe the contract against the insurance company. Id. This is especially true where the policy language in question concerns an exclusion clause. Id. When an insurance company fails to clearly exclude that which the insured attempted to protect against, we must construe the ambiguous policy to further the policy's basic purpose of indemnity. Id. A policy is ambiguous only if it is susceptible to more than one interpretation and reasonably intelligent persons would differ as to its meaning, not simply because a controversy exists between the parties as to interpretation. Id.; Castillo v. Prudential Property & Cas. Ins. Co., 834 N.E.2d 204, 206 (Ind. Ct. App. 2005).

Discussion and Decision

The essence of the argument between the parties is whether Hoosier's policies cover the claims brought against Kenray as a result of the problems with the Kenray 32 software. Hoosier claims that at least one of several exceptions to coverage apply contained in the policies. Kenray contends that if any one of the claims brought against it fall within the coverage provided by the policies, then Hoosier is required to defend it against all claims.

The commercial marketplace policy generally provides coverage for "those sums [Kenray] becomes legally obligated to pay as damages because of 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' to which this insurance applies[.]" Appellant's App. pp. 145, 248. The commercial umbrella policy similarly covers "those sums that [Kenray] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies[.]" Appellant's App. pp. 186, 291. Among the exclusions to coverage contained in both policies is one referred to as the "Impaired Property Exclusion." This exclusion provides as follows:

> This insurance does not apply to:
>
> * * *
>
> [] **Damage to Impaired Property or Property Not Physically Injured**
> "Property Damage"[2] to "impaired property" or property that has not been physically injured arising out of:

[2] The policies define "Property damage" as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Appellant's App. pp. 158-59, 199, 261-62, 305.

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work";[3] or
(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

Appellant's App. pp. 150, 189, 253, 294. The policies define "impaired property" as:

> [T]angible property, other than "your product" or "your work", that cannot be used or is less useful because:
> a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
> b. You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by:
> a. The repair, replacement adjustment or removal of "your product" or "your work"; or
> b. Your fulfilling the terms of the contract or agreement.

Appellant's App. pp. 156-57, 197, 259-60, 302.

Hoosier argues that the claims against Kenray are not covered under the policies because they fall within the scope of this impaired property exclusion. Based upon the plain language of the exclusion, we agree. Kenray was sued by three of its customers who alleged that Kenray's software did not function properly and caused problems with their computer systems. These customers' computer systems thus fit within the definition of "impaired property" as set forth in the policies: they are tangible property other than Kenray's product which could not be used or were less useful because they incorporated Kenray's software, which was alleged to be defective, deficient, inadequate, or dangerous; the customers' computer systems were alleged to be unusable or less useful

[3] There appears to be no dispute that Kenray's software falls within the pertinent definitions of "your work" or "your product" contained in the policies.

because Kenray failed to fulfill the terms of the warranties allegedly made to the customers; and, the computer systems could be restored to use by the repair, replacement, adjustment, or removal of Kenray's software or by Kenray fulfilling the warranties alleged to have been made.[4]

The impaired property exclusion explicitly states that the insurance does not apply to damage to impaired property or property not physically injured which arises out of a defect, deficiency, inadequacy, or dangerous condition of Kenray's product, i.e. Kenray's software, or arising out of a delay or failure of Kenray to perform a contract or agreement in accordance with its terms, i.e., the warranties allegedly breached. Thus, the policy excludes coverage for products which simply do not work as promised. See Microvote Corp. v. GRE Ins. Co, 779 N.E.2d 94, 96-97 (Ind. Ct. App. 2007) (holding that insurance policy provisions excluding property damage to the insured's own product and an impaired property exclusion did not cover claims arising out of defective voting machines sold by insured); see also Blue Isle of Calif., Inc. v. The Hartford, 66 Fed. Appx. 704, 705 (9th Cir. 2003) (concluding that impaired property exclusion disclaimed coverage for loss of use of tangible property resulting from failure of insured's product to meet warranted level of performance).

Kenray argues that the last sentence of the impaired property exclusion contains an exception to the exclusion which is applicable to the claims against it. This exception

[4] To the extent that the court in Computer Corner, Inc. v. Fireman's Fund Insurance Co., 46 P.3d 1264, 1268-70 (N.M. Ct. App. 2002), held that a similarly-worded impaired property exclusion was unintelligible, we simply disagree. While this exclusion as drafted might not be the model of clarity, we do not think it so incomprehensible or unintelligible as to be unenforceable.

states that the exclusion does not apply to "the loss of use of other property arising out of sudden and accidental physical injury to 'your product' or 'your work' after it has been put to its intended use." We fail to see how malfunctioning computer software could be considered to be a "sudden and accidental *physical* injury" to Kenray's product causing loss of use of the customers' computer systems.

The cases cited by Kenray are readily distinguishable. In Anthem Electronics, Inc. v. Pacific Employers Insurance Co., 302 F.3d 1049, 1059-60 (9th Cir. 2002), the claims against the insured alleged *physical* damage to circuit boards supplied by the insured. Similarly, in Corder v. William W. Smith Excavating Co., 556 S.E.2d 77, 84-85 (W.Va. 2001), the court held that an impaired property exclusion might not apply if the insured could produce evidence that the *physical* failure of a sewer pipe met the "sudden and accidental physical injury" exception to the exclusion. And in Riley Stoker Corp. v. Fidelity and Guaranty Insurance Underwriters, Inc., 26 F.3d 581, 589 (5th Cir. 1994), the court upheld the district court's finding that the exception to the exclusion was applicable because there was evidence that the loss of use of the customer's property resulted from a "sudden and accidental" *physical* injury to the insured's product.

Here, there is simply no indication of any sudden and accidental *physical* injury to Kenray's software, just allegations that the software did not function properly. See Blue Isle, 66 Fed. Appx. at 705 (concluding that "sudden and accidental physical injury" exception to impaired property exclusion was inapplicable where there was no suggestion that insured's product suffered any physical injury but was simply defective).

Kenray also argues that the claims against it are covered under a "products-completed operations" coverage, for which it paid a separate premium and which contained a separate coverage limit. Kenray claims that the Hoosier policies fail to define the scope or extent of the coverage provided by this "products completed" provision. To the contrary, the definition section of both policies sets forth a definition of the "products-completed operations hazard."[5] More importantly, regardless of whether the products-completed provision would otherwise extend coverage to Kenray, we have concluded above that the impaired property exclusion acts to bar coverage for the claims against Kenray. The property damage covered by an insurance policy can only be determined by resort to the contract as a whole, including all exclusionary provisions.

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[5] Specifically, the definition section of both policies contains the following definition:

> "Products-completed operations hazard:
>
> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> (a) When all of the work called for in your contract has been completed.
>
> (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
>
> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
>
> * * *
>
> b. Does not include "bodily injury" or "property damage" arising out of:
>
> (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured; or
>
> (2) The existence of tools, uninstalled equipment or abandoned or unused materials.

Appellant's App. pp. 158, 261, 199, 304-05.

Indiana Ins. Co. v. DeZutti, 408 N.E.2d 1275, 1278 (Ind. 1980). Indeed, "if any one exclusion applies there should be no coverage, regardless of the inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions."[6] Id.

The claims brought by Kenray's customer's fall within the impaired property exclusion to coverage under Hoosier's claims, and the "sudden and accidental" physical injury exception to this exclusion is inapplicable. Because we conclude that the claims fit within this exception, we need not consider whether they also fit within other exceptions to coverage. See id. The trial court therefore did not err in granting summary judgment in favor of Hoosier.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.

[6] Kenray also argues that the loss of use of the computer systems alleged by its customers amounts to "property damage" as defined by the policies. However, because the loss of use alleged by the customers fits within the impaired property exclusion, the customer's complaints do not trigger coverage. See id.